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EIGHT HOURS AND NINE JUDGES

By IRVING EDMAN

WHILE the national chairmen were conducting the Presidential campaign with party textbooks, advertisements and spellbinders, an equally important though much more silent campaign was being waged by the general counsel of the 225 railroads affected by the eight-hour law and the attorneys of the national government. This campaign is to be settled not by sixteen million voters, but by the nine men constituting the nation's highest tribunal, and the battle is being waged with other than the usual campaign weapons.

The leaders of both sides have for months been equipping themselves with data of traffic conditions, mileage wage scales and microscopic examinations of the Adamson law with special reference to the United States Constitution. The thousands of pages of testimony that are being prepared and the combined legal efforts of all the railroads in the country are focussed upon one question: Is the Adamson act constitutional? Neither the railroads nor the brotherhoods are asking the question out of political curiosity. To the railroads it means an annual difference, it is estimated, of $50,000,000, to the 400,000 trainmen an increase of 25 per cent in wages. But to the country at large this single question of the constitutionality of the measure is of pivotal importance. The Supreme Court cannot officially be in politics, but in deciding the issue betwen the railroads and 400,000 of their employes it is deciding the character of labor legislation and of labor tactics for many years. The dramatic quality of the conflict consists in the fact that the railroad lawyers if they succeed in proving the law unconstitutional are not only saving the roads $50,000,000, but are effectively blocking what looked in the hot, hasty legislation of early September like a sure method of labor triumph.

Attorney General Gregory, if he is able to have the law sustained, is not only confirming the brotherhoods' victory but paving the way for legislation that constitutional experts of a generation ago would have declared impossible. Organized labor, as represented in the American Federation of Labor, and organized capital, typified in the recently formed National Industrial Conference, are watching these legal proceedings in the closest detail, because they realize that the eight-hour decision will create a precedent of great moment to Congressional action in the next decade. And the bill itself will be tested almost entirely in terms of precedents established since 1898, when the Supreme Court first approved the regulation of hours by law.

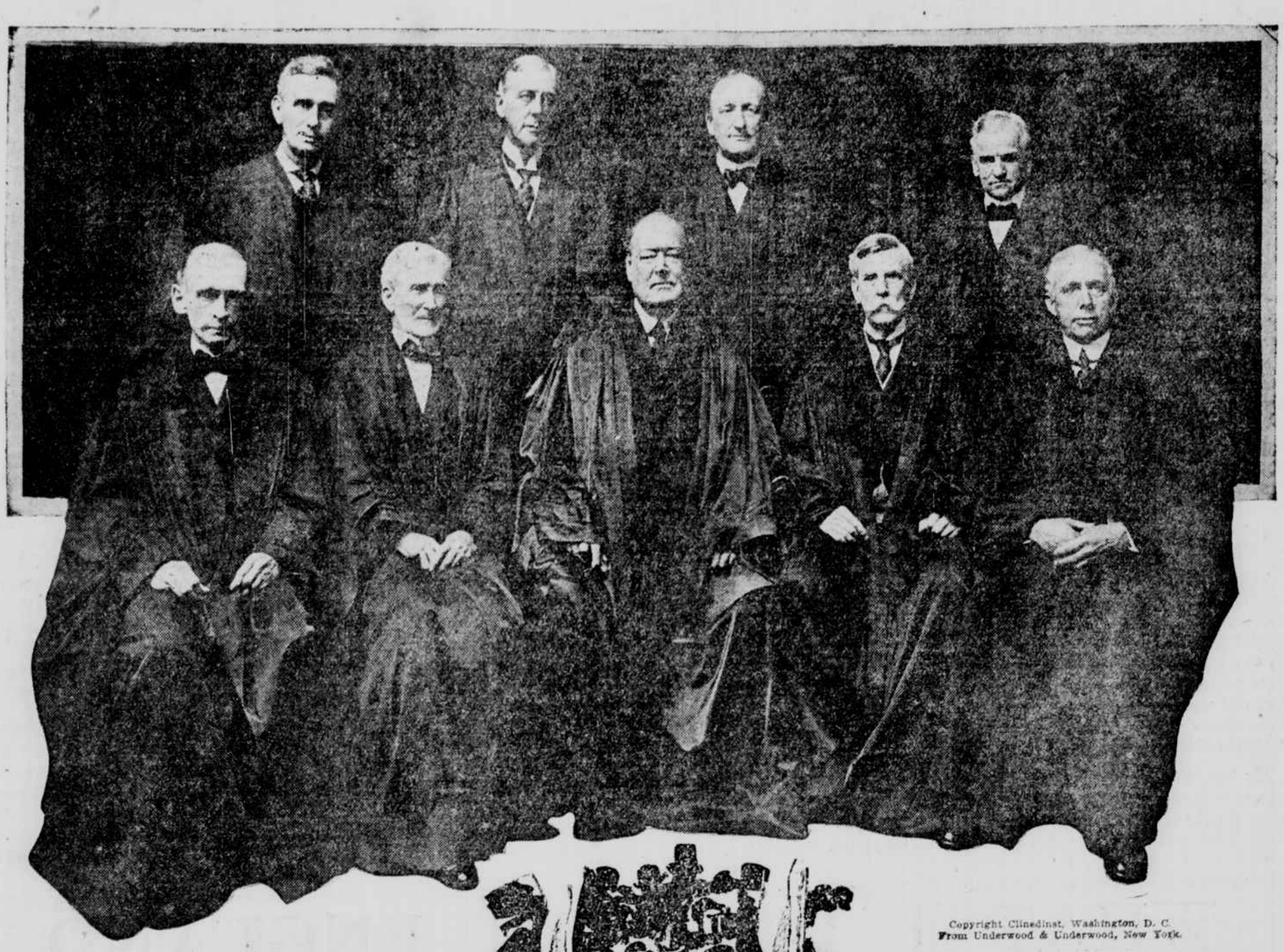
The President had scarcely signed the act in his private car, on September 3, when the railroad attorneys began the search for vulnerable spots. They were at first a little uncertain as to whether or not to obey, and let the courts take the offensive. At a conference held in this city over a month ago, however, by seventy railroad heads and their general counsel, it was unanimously decided to attack the constitutionality of the measure before it went into effect. This legally unusual procedure was determined upon for several urgent reasons. In the first place, the railroads' action is precipitated by the conviction on the part of certain eminent constitutional lawyers that the law is shot through with illegalities. Some have gone so far as to declare that a mere casual reading of the document reveals its shortcomings. Secondly, the railroads had no desire to incur the heavy penalties that might be inflicted if they merely waited until the attorneys of the various districts indicted them for violations. As none of them intended to comply, there was a technical possibility of 400,000 violations, one in the case of each of the 400,000 employes affected. Wherefore the presidents and their legal staffs decided to take time by the forelock and test the constitutionality of the measure even before it went into operation.

The main objective is, of course, the Supreme Court. Both sides want a final interpretation as fast as the involved legal routine will permit. In each Federal district court an injunction is being sought to prevent the government attorneys from indicting the railroads for violations of the Adamson act. Attention is being concentrated on one case, at present, that of the Missouri, Oklahoma & Gulf Railroad, which first filed its suit in Kansas City. At the present writing District Judge Hook had handed down a decision that the law was unconstitutional. This, far from settling the matter, was merely the first step in hurrying the suit on to the final scene of the conflict, in the Supreme Court at Washington.

The railroads are insisting that a test case be made on one of the larger railroads, rather than on the bankrupt road which secured the first decision. The Government and the General Counsel will come to an agreement within the next few days, and if one satisfactory test can be determined upon, all the other suits will be withdrawn.

The battle officially is to be between this one railroad and the government of the United States. But behind both sides will be whole armies of legal aid. Indeed, the Kansas City judge has requested all the railroads involved to have legal representatives at the Supreme Court hearings. And the brotherhoods, although they will have to sit on the sidelines, are not placidly depending on the efforts of the Department of Justice. The Attorney General has been in close touch with the brotherhood leaders for expert information. One of the important bones of contention will be the mileage method of payment at present largely in vogue, and the trainmen leaders are seeing to it that the Supreme Court hears about that from them, as well as from their employers.

The fact that the railroads have taken the offensive and the bills filed in the Kansas City suits indicate the main lines of the legal battle. The railroads will practically rest their case on the unconstitutionality of the measure from the very face of the law, although they will try to show by a mass of technical evidence that the law is absolutely unworkable and inapplicable to railroad conditions. The important point, from the legal standpoint, is to prove to the court that the law is not an eight-hour law at all, but an arbitrary increase in wages. They have carefully surveyed the precedents of the last twenty years of Supreme Court proceedings and realize that a bona-fide eight-hour law would be more than likely to win court sanction.



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Drawn by C. B. Falls

BRINGING IN THE SACRED ARK OF THE PRECEDENT

A real health law would have behind it the famous Oregon case in which Justice Brandeis, then counsel for the state, succeeded in having sustained a ten-hour law on hygienic grounds. The restriction of labor conditions has crept beneath the barbed wires of constitutionality and made a snug place for itself under the protecting wings of "public policy." The government attorneys will make the most of just this point, and will bring to bear all the scientific and economic facts and theories that can be dug out of the libraries, to show that an eight-hour day has the sanction of the community and is its social salvation. If they could prove that it was an eight-hour day the trainmen were getting, their opponents, the railroad general counsel, would not be in such a hopeful mood.

The first tactics of the railroads, then, will be to show that the Adamson act has nothing whatsoever to do with the health and morals of the trainmen—these being the grounds upon which hour laws have hitherto been supported. They will show, in the first place, that a law passed by Congress eight years ago makes it legitimate for railroad men to work up to sixteen hours, and that, owing to the extraordinary conditions of train operation, it is impossible to put an eight-hour day into effect. And here the Supreme Court will be treated to such a detailed survey of the railroad industry as has never before been attempted. Upon the records of the court will be produced the minutest detail of railway operation—switching and hostling, fast and slow freights, the geography of railway divisions, the lengths of runs, the time off between runs, the whole tangled field of moving the country's rolling stock—will be gathered into volumes of testimony; all for the purpose of showing that, not even with the best intentions in the world, could an eight-hour day be put into operation.

The railroad lawyers hope, moreover, by tagging and tabulating the whole railroad industry, to show that not only is the law unworkable, but that, in view of all the varieties of wage and route schedules, it is impossible to understand exactly what is to be done with the Adamson law. Freight employes, for example, are paid on the basis of a hundred-mile run, which often takes more than ten hours. The railroad lawyers will ask, more or less rhetorically, how an eight-hour day can be applied to a 100-mile run. And they will be at pains to show that one often can't end a railroad run at the end of eight hours without leaving trains and trainmen stranded five miles from nowhere.

That the eight-hour law is not an eight-hour law is, for the railroads, only the beginning of the work. It clears the legal tracks for the question of whether Congress has the right to regulate wages, under its powers to regulate interstate commerce. Here the general counsel, equipped with a thorough knowledge of the opinions of the Supreme Court in this direction, feel they have a particularly effective line of attack. Every precedent is a momentous weapon in constitutional law, and the search of the records reveals, as even most of its advocates admit, that the Adamson act is an extraordinarily unprecedented measure. Minimum wage laws, when they have been upheld, have been sanctioned on the ground that they protected public health and morals, that a living wage was necessary to the general public welfare. Seven hundred and sixty-odd dollars was the minimum set by the Massachusetts investigating commission of 1910, and the railroads advance the facts that freight brakemen earn more than that now. The railroads will follow this up by reviving that time-honored slogan of constitutional combats—class legislation. On this point, however, they are liable to be a little timid, as the courts have not, of late years, balked at reasonable classification.

To the layman who wants the law settled on its present merits there may be some surprise in the amount of attention that will be paid in the forthcoming trial to the precedents involved. The last fifteen years have crowded the state courts with mooted labor laws, and both sides have set their array of assistants going through the records for precedents. The government will quote the Oregon case, and all the state court cases where limitation of hours has been approved. The railroads will be sure to quote the Supreme Court itself, which condemned the New York bakers' ten-hour law after it had passed the New York Court of Appeals, on the ground that it wasn't in any sense a health law. The Supreme Court may reverse itself as it did after a score of years in the case of the income tax. But a precedent that is only eleven years old—the bakers' case was settled in 1905—is still in the living and effective past. The court once overruled itself, to be sure, but it is well to remember that the institution, while the same in name, had materially changed between the two income tax decisions.

There have likewise been important changes since the decision against the Ten-Hour law in 1905. Justices of the Supreme Court are officially dehumanized creatures, with a purely eagle-eyed technical interest in the proceedings. But Supreme Court justicces are ruled, no doubt, by the precedents of their own lives, as well as by the precedents of the courts of which they are a part. There are Clarke and Brandeis, the recent radical appointees. Justice Brandeis's constitutional views are doubtless built, among other things, out of the Ten-Hour case, in which he played so conspicuous a figure. And there is Holmes, who recently has been a fairly consistent dissenter. The Constitution is to a degree a permanent and inflexible document, but the people who interpret it are bound to read it in the changing light of the changing times. Every radical law requires the court to read more into the sacrosanct paragraphs. The railroad lawyers will stick to the letter and the Attorney General will read between the lines.

But, while the nine justices, general counsel and the Attorney General and his staff hold the centre of the stage, they are by no means the only people in the cast. There is the whole retinue of legal small fry, the patient worms of the law, the diggers of ancient legal history that will to an amazing extent determine the fate of this crucial piece of legislation. The first legal skirmishing in Kansas City has been a setback for the government and the brotherhoods. But not until the Supreme Court hands down a decision will there be any definite result of the crowded days of last August.

And that result, told in thousands of words of somber legal sound, may be calculated to stir the Brotherhoods and the National Industrial Conference as much as the more glowing phrases of the recent campaign. Both sides, as in the old saying, will let any one make the nation's laws, as long as they know the Supreme Court can unmake them. For the laws that the Supreme Courts unmake will largely determine those that can be made. And this consideration interests a larger audience than the railroading population who have an immediate pocketbook interest in what is going to happen to the eight-hour law.